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Nos. 14-556, 14-562, 14-571, 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, *et al.*, *Petitioners*,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*, *Respondents*.

VALERIA TANCO, *et al.*, *Petitioners*,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, *et al.*, *Respondents*.

APRIL DEBOER, *et al.*, *Petitioners*,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*, *Respondents*.

GREGORY BOURKE, *et al.*, *Petitioners*,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* THE RUTH INSTITUTE AND DR. JENNIFER ROBACK MORSE, PhD, IN SUPPORT OF RESPONDENTS AND IN OPPOSITION TO REVERSAL

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INTERESTS OF AMICI CURIAE[1]

Amici curiae have specific expertise in the socio-economic effects of marriage in society, particularly changes in marriage laws. Amici therefore stand in a unique position to assist and educate the Court regarding the turbulent effect Petitioners' request, if granted, would have on the lives of American children. Amici stand in strong opposition to removing the gender requirement from marriage laws.

Amicus The Ruth Institute is an inter-faith organization based in San Diego, CA, that addresses the lies of the Sexual Revolution. The Ruth Institute promotes five core values: 1) Marriage as the proper context for sex and child rearing; 2) Respect for the contributions of men to the family; 3) Marriage as a lifelong commitment between one man and one woman; 4) Lifelong spousal cooperation as a solution to women's aspirations for career and family; and 5) Cooperation, not competition, between men and women.

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[1] Pursuant to Supreme Court Rules 37.3 and 37.6, all parties have consented to the filing of this brief. A letter of consent to the filing of this brief was filed by the Petitioners in these matters with the Clerk of the Court and a blanket consent for the filing of amicus curiae briefs has been given by Respondents in these matters. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. In addition, no persons or entities other than amici curiae or their counsel made a monetary contribution to the preparation or submission of the brief.

Amicus Dr. Jennifer Roback Morse, Ph.D. is the founder and President of the Ruth Institute. Dr. Morse received her Ph.D. in economics from the University of Rochester in 1980 and spent a postdoctoral year at the University of Chicago during 1979 to 1980. She taught economics at Yale University and George Mason University for 15 years, and was the John M. Olin visiting scholar at the Cornell Law School in the fall of 1993. Dr. Morse served as a Research Fellow for Stanford University's Hoover Institution from 1997-2005, and currently is the Senior Research Fellow in Economics at the Acton Institute for the Study of Religion and Liberty.

Dr. Morse is the author of *Smart Sex: Finding Life-long Love in a Hook-up World,* (2005) and *Love and Economics: Why the Laissez-Faire Family Doesn't Work* (2001), reissued in paperback, as *Love and Economics: It Takes a Family to Raise a Village.* Dr. Morse's scholarly articles have appeared in the *Journal of Political Economy, Economic Inquiry, The American Economic Review, The Journal of Economic History, Publius: The Journal of Federalism, The University of Chicago Law Review, The Harvard Journal of Law and Public Policy, Social Philosophy and Policy, The Independent Review,* and *The Notre Dame Journal of Law Ethics and Public Policy.*

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have come before this Court requesting Constitutional affirmation of the feelings adults have for other adults. Amici curiae ask this Court to instead affirm the Constitutional rights of children to know who they are and where they came from. The two

positions cannot coexist. This Court must choose one or the other: either affirm the long established law providing Constitutional protection for the rights of children and families, or abandon such protections and rule that the desires of adults are more important than the legitimate needs of children.

ARGUMENT

I. THE PUBLIC PURPOSE OF MARRIAGE IS TO ATTACH MOTHERS AND FATHERS TO THEIR CHILDREN AND EACH OTHER.

The case before you today presents a unique opportunity to this Court, one that it should not lightly circumvent: to define the purpose of marriage in the public square. Why is marriage, as an institution, recognized by government at all? Amici, Dr. Jennifer Roback Morse, Ph.D., and The Ruth Institute, are in a unique position to assist the Court in addressing that question because the socio-economic role of marriage within society has been the primary focus of amicus Morse's work since 2001.

What is the public purpose of marriage?

> "Marriage is society's primary institutional arrangement that defines parenthood. Marriage attaches mothers and fathers to their children and to one another. A woman's husband is presumed to be the father of any children she bears during the life of their union. These two

> people are the legally recognized parents of this child, and no one else is."[2]

In 2003, following the decision in *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass., 2003), Massachusetts became the first state to require legal recognition of same-sex unions. Since then, public discourse on the nature of civil marriage has been widespread. Those who would completely dissociate modern society from the historical and natural definition of marriage have not addressed the far reaching legal ramifications of removing marriage's gender requirement. Of particular concern to amici are: the inevitable denigration of the legal status of natural parents; the loss of children's rights to know their natural parents; and the severance of the biological definition of "parent" from its legal definition, all of which are inevitable should this Court find in favor of Petitioners.

The law regarding same-sex relationships has changed radically over the past twenty years, and in an effort to help foster these changes, Courts have attempted to define marriage outside of its historical and generative context. For example, in *Goodridge*, the Court asserted that,

> "[w]hile it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage

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[2] Dr. Jennifer Roback Morse, "Privatizing Marriage is Impossible," *Public Discourse*, April 2, 2012, http://www.thepublicdiscourse.com/2012/04/5069.

> partners to one another, not the begetting of children, that is the sine qua non of civil marriage." *Id.* at 440 Mass. 309, 332.

The Court in *Perry v. Schwarzenegger,* 704 F. Supp. 2d 921, 961 (N.D. Cal., 2010), defined marriage this way:

> "Marriage is the state recognition and approval of a couple's choice to live with each other, to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents."

What these Courts and others fail to explain is why a state has any interest at all in the private feelings and commitments of adults without concern for the welfare of the children such relationships sometimes produce. The purposes of marriage proposed by these Courts are not really public purposes at all.

The *Goodridge* and *Perry* Courts, as well as any other Court that endeavors to sever the procreative significance of marriage from its public purpose, are wholly and unequivocally ***wrong***. As observed by amicus Morse:

> "[N]ot every marriage has children. But every child has parents. This objection [that not all married couples have children] stands marriage on its head by looking at it purely from the adult's perspective, instead of the child's.... It is about time we look at it from the child's point of view, and ask a different kind of question. *What is owed to the child*?

> Children are entitled to a relationship with both of their parents. They are entitled to know who they are and where they came from... but children cannot defend their rights themselves. Nor is it adequate to intervene after the fact, after harm already has been done. Children's relational and identity rights must be protected proactively. Marriage is society's institutional structure for protecting these legitimate rights and interests of children."[3]

Once marriage is stripped from its concern with the welfare of children, nothing remains of a genuinely public purpose. Marriage becomes little more than a government registry of friendships, which is, arguably, none of the public's business.

A few judges have looked at the historical and social connotations of marriage and have correctly defined it to include the legal connection between parents and children. Unfortunately, such judges are often in the minority. For example, Massachusetts Supreme Court Justice Cordy, in his *Goodridge* dissent, stated that marriage provides:

> "the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other.... [A]side from an act of heterosexual intercourse nine months prior to childbirth, there is no process for creating a relationship

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[3] Dr. Jennifer Roback Morse, "Privatizing Marriage is Impossible," *Public Discourse*, April 2, 2012, http://www.thepublicdiscourse.com/2012/04/5069.

> between a man and a woman as the parents of a particular child. The institution of marriage fills this void by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic." *Goodridge* at 440 Mass. 309, 382-383 (Cordy, J., dissenting).

The majority opinion in the *Goodridge* decision illustrates the inevitability of that chaos. On the one hand, the Court makes the connection between the definition of marriage and the definition of parenthood abundantly clear: "Exclusive marital benefits that are not directly tied to property rights include the presumptions of legitimacy and parentage of children born to a married couple." *Id. at* 440 Mass. 309, 324. On the other hand, the Court confuses the issue by referring to presumptions of "legitimacy" and "parentage," instead of the presumption of "*paternity*" that has existed in common law for centuries. This shift is not merely semantic, but is instead a sleight of hand that inevitably results in the disenfranchisement of parental and familial rights. Massachusetts law now ***creates*** parenthood within a marriage, where formerly the law merely ***recognized*** it.

In opposite-sex relationships, if a woman becomes pregnant, her husband is almost always the natural parent of her child. In same sex relationships, however, the spouse of the pregnant woman *never* is.

The same-sex partner of a biological parent is the legal equivalent of a step-parent. Like any other step-

parent, the same-sex partner of a biological parent has no genetic connection to the child. When a child is born to a parent who is married to someone of the same sex, the partner of the parent is and should remain a legal stranger to the child unless and until an adoption proceeding is brought, a best interests hearing is held, and an adoption decree is entered. If the second natural parent is fit and has not surrendered parental rights, such a decree is, and should remain, prohibited by law.

The legal presumption of "parentage" rather than "paternity" serves as the vehicle through which the child becomes legally separated from his or her natural parents. Parental rights are vested in unrelated persons though neither a formal adoption proceeding nor a corresponding "best interests" hearing, (which serves as a Constitutional safeguard), has ever been conducted by any court.

Should this Court rule in favor of Petitioners, the chaotic presumption of parentage favored by *Goodridge* would be forced upon all 50 states, all US territories, and would give a Constitutionally impermissible advantage in parentage actions to persons who have no genetic connection to a child, without deference to the Constitutional rights of the child's natural father or natural mother.

II. REMOVING THE GENDER REQUIREMENT FROM MARRIAGE CREATES LESS EQUALITY, NOT MORE.

Parents have a Constitutional right to bring up their own children. "The Due Process Clause of the Fourteenth Amendment protects the fundamental right

of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville,* 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed.2d 49 (2000). "So long as a parent adequately cares for his or her children, there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Id.* at 530 U.S. 68-69. Removing the gender requirement from marriage *always* comes with a corresponding removal of the gender requirement from *parenting*. This legal maneuver necessitates more, not less, state intervention. The move toward "marriage equality" has created deep inequalities in the lives of American families.

In *Kulstad v. Maniaci*, 2009 MT 326, 352 Mont. 513, 220 P.3d 595 (Mont., 2009) two women entered into a common-law domestic partnership. One of the women, Barbara Maniaci, legally adopted two children during her time with Kulstad and was the children's only legal parent for the duration of the relationship. When the couple split, however, the civil partner of the children's legal mother was awarded a "parental interest in the minor children." *Id.* at 220 P.3d 597.

This case is disturbing for several reasons. First, children are not property in which various adults can claim an "interest." Secondly, the Court's decision amounts to a *de facto* adoption, judicially imposed upon Maniaci without her consent. Finally, Maniaci's parental autonomy was greatly weakened by the Court's decision. Maniaci must share her children with someone who has no biological or adoptive relation to them. Even though Maniaci is the children's only legal

parent, she cannot move out of state without court permission, she cannot allow a future spouse to adopt her children, and she is forever tied to someone who, solely due to a prior romantic involvement, gained an "interest" in her children's lives. In stark contrast to the principles discussed in *Troxel*, the same-sex relationship of these two women forced the state into the children's lives, rather than out of it.

A nearly identical case occurred in New Mexico. In *Chatterjee v. King*, 280 P.3d 283 (N.M. 2012), the Court held that the New Mexico Uniform Parentage Act required that parentage be assigned to the same-sex partner of a legal mother. Taya King had legally adopted a child overseas, but her same sex partner never adopted the child in the United States. Nonetheless, the Court held that King's partner was a "natural mother" under the law in the same way that a man would be considered the "natural father" of a child born to a marriage. Again, the mother who had sole parental rights lost her parental autonomy because the Court paid closer attention to gay-rights policy considerations than it did to a mother's fundamental Constitutional rights.

Why is this legally relevant? Compare the New Mexico and Montana parental rights cases with the Illinois case of *In re M.M.*, 619 N.E.2d 702, 156 Ill.2d 53, 189 Ill. Dec. 1 (Ill. 1993). In *M.M.*, the Cook County Public Guardian wanted to place conditions within the final adoption decrees of children placed through foster care. The Guardian sought a requirement that separated siblings be allowed to maintain contact with one another after the adoption order was entered. *Id.* at 156 Ill.2d 58. The motivation behind the Guardian's

request was well-intentioned, but the Illinois Supreme Court found that adoption decrees must be entered unconditionally. Adoptions vest permanent irrevocable rights in the legal parents, and the Court held that, as such, adoptions cannot be subject to any conditions- not even a requirement of sibling contact. *Id.* at 156 Ill.2d. 73.

The Illinois case demonstrates that parental rights are not intended to be subject to any outside stipulations, no matter how well-intentioned they may be. The parental rights of Barbara Maniaci and Taya King, however, were made conditional after the fact, solely because of the nature of their romantic relationships.

The Montana and New Mexico cases both deal with relationships involving only women, but men also suffer inequalities as a result of genderless marriage. These inequalities are inherent in the use of third party reproduction, whether a man provides sperm anonymously, or is known to the women he impregnates, men who provide sperm to lesbian couples are not treated equally with other fathers. Some excluded fathers will want a relationship with their children, but such rights are usually denied.[4]

The state courts in these cases made their decisions based upon their interpretation of their various state laws. The Respondents in the instant case, however, recognize that the public purpose of marriage is inextricably intertwined with parentage. Respondents

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[4] See http://www.dailyrecord.com/story/news/2015/02/16/gay-nj-couple-locked-legal-battle-sperm-donor/23481187/

can and should exercise their authority to encourage natural parental rights and strong familial relationships. "The rights to conceive and to raise one's children have been deemed 'essential,' basic civil rights of man, and rights far more precious than property rights." *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed.2d 551 (1972), *citing Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923) (additional citations omitted).

In *Brokaw v. Brokaw*, 235 F.3d 1000, 1018 (7th Cir. 2000), the Seventh Circuit Court recognized that substantive Due Process includes the "right to familial relations." The Court explained that, in addition to "the right of a man and woman to marry, and to bear and raise their children," substantive Due Process encompasses a complimentary right "of a child to be raised and nurtured by his parents." *Id.*

The right to familial relations is also rooted in the Equal Protection Clause. As discussed in *Stanley v. Illinois*, "[t]o say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue, for the Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses." *Stanley* at 405 U.S. 652, *citing Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 75-76, 88 S. Ct. 1515, 1516, 20 L. Ed.2d 441 (1968).

Respondent States do not violate the Fourteenth Amendment Due Process or Equal Protection clauses when protecting these important familial rights because familial rights are themselves afforded Fourteenth Amendment protection. The significance our society attaches to these biological ties is evidenced

by the multitude of legal contexts in which they are recognized, both on state and federal levels. For example, federal regulations require that foster and adoptive agencies respect children's connections to their families of origin.[5] When children are removed from their homes, child protective services are required to look to blood relatives as possible placements for the children.[6] Forty-three states, including the four Respondent states of Kentucky, Michigan, Ohio, and Tennessee, have laws permitting adoptees to gain access to information about their biological origins.[7] The Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, also stresses the importance of maintaining children's genetic and cultural heritage. *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed.2d 29 (1989).

The briefs of the Petitioners and the numerous amici who support their position define marriage purely from affection, contract, and economic perspectives. Some have claimed that a marriage should, of necessity, encompass a presumption of "parentage" for a non-biological partner rooted in contract law. The bestowing of parental rights in this manner is, in many ways, similar to "traditional" surrogacy arrangements, in which a woman conceives

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[5] Child Welfare Information Gateway, https://www.childwelfare.gov/systemwide/laws_policies/statutes/placement.cfm "Current through July 2013."

[6] Id.

[7] "Adopted Child's Right to Information as to Biological Parents" http://www.stimmel-law.com/article/adopted-childs-right-information-biological-parents

through artificial insemination for the purpose of relinquishing the child to the donor and his spouse. However, states that allow such surrogacy arrangements have expressly prohibited women from signing away their parental rights before the child is born. *See, e.g., In Re Baby, et al.*, __ Tenn. __ (Slip.Op. No. M2012-01040-SC-R11-JVM, decided September 18, 2014).

Similarly, mothers who make adoption plans for their children are permitted to change their minds once the baby is born. No state in the Union honors an adoption contract made *before* a child is born. New parents often say things like "I had no idea how I would feel." Until recently, the law has recognized the strength and uniqueness of the maternal bond. A woman who forms a legal union with another woman is the only mother who cannot reconsider after her child is born. *See, e.g., Miller-Jenkins v. Miller-Jenkins.*, 12 A.3d 768, 2010 VT 98 (Vt., 2010).

These cases illustrate an important question: if a surrogate can change her mind after the baby is born, and a mother who has made an adoption plan can change her mind after the baby is born, then why can't a mother in a same-sex relationship change her mind after the baby is born? Why shouldn't the mother's partner go through an adoption process, like any other person unrelated to the child? "Marriage equality," which is supposed to create "equality" among married couples, actually ensures that mothers and their children are less equal. The legal wrangling that shifts family law from presuming paternity to presuming parentage requires this absurd result. States can and should avoid creating the legal chaos that ensues when

gender is removed from the marital institution. Respondents' laws regulating marriage, laws that lie solely within the realm of the States, show prudent resistance from social engineering, and this Court should exercise that same restraint.

III. STATES HAVE AN INTEREST IN PROTECTING THE RIGHTS AND WELFARE OF CHILDREN.

In addition to defining the public purpose of marriage, this Court should also consider a related question: what does government owe to children? According to Article 7 of the United Nations Convention on the Rights of the Child, "[a] child... shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents."[8]

Individual states are in the best position to safeguard children's rights. When familial ties break down, the state becomes involved to ensure that the child's right to know and be raised by his or her parents is protected as much as possible. The State also becomes involved to defend children from harm, provide them with an education, and teach children the importance of good citizenship.

The services and protections provided by government to promote children's welfare must also be

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[8] **United Nations Convention on the Rights of the Child,** Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, available on-line at http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf last accessed March 12, 2015.

Constitutional. "What procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Stanley v. Illinois* at 405 U.S. 650, *Citing Cafeteria and Restaurant Workers Union etc. v. McElroy,* 367 U.S. 886, 894, 81 S. Ct. 1473, 1748, 6 L. Ed.2d 1230 (1961). The Respondent States must provide a legal structure through which they can preserve children's rights with minimal government involvement.

Unfortunately, granting Petitioners' request would obliterate the ability of the States to exercise their proper role in safeguarding vulnerable children. The reasons for this are twofold. First, removing the gender requirement from marriage would create additional structural injustices to children. Secondly, removing the gender requirement from marriage would have a detrimental effect on children's social outcomes.

A. States Have an Interest in Minimizing Structural Injustices to Children

Children, unlike adults, do not need autonomy or independence. The child is entitled to a relationship with and care from both of the people who brought him into being. The "changing American family" referenced in *Troxel* and *Goodridge* has left children as its victims, creating "structural injustices to children," injustices that would be avoided if their parents committed themselves to permanent relationships with each other.

Some children live with both of their biological parents. Other children do not. Some children feel like

leftovers from a previous relationship. Others do not. Some children have one permanent home. Other children are asked to change their lodgings every week. Some children grow up with the same set of siblings for their entire childhoods. Other children may come back to one of their homes to find that their step-siblings and half-siblings have moved, because the adults' relationship broke up.[9]

These examples illustrate "structural" injustices because they are inherent in the structure of the child's particular family. The adults may be good decent people, with good parenting skills. The problem is not with the particular individuals, and may not be solvable by the particular individuals. The children have these experiences and feelings, despite adults' good intentions.

Such injustices have been brought about, in large part, by the Sexual Revolution. Amicus The Ruth Institute is committed to helping victims of the Sexual Revolution, providing, among other things, helpful literature and a blog called Kids Divorce Stories.[10] For the past fifty years, our society has been experimenting with a variety of family structures. Sufficient data exists to show that children **do** need both their mothers and their fathers,[11] and that fathers make distinct

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[9] http://www.marriage-ecosystem.org/the-kids-will-be-fine-if-the-adults-are-happy.html

[10] www.Kidsdivorcestories.org

[11] Among the many citations that could be given, "Why Marriage

contributions to the well-being of children.[12] Researchers have shown that problems for children become more serious as the children grow older.[13]

The Ruth Institute did not invent the concept of structural injustices to children as a way of singling out same sex couples. Amicus Morse has been writing about these problems as caused by heterosexual couples since 2001.[14] Nonetheless, structural injustices to children are prevalent in families led by two persons of the same sex.

Same sex couples can have children in their homes in several ways: adoption, children from a previous heterosexual relationship, or third party reproduction,

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Matters: 26 Conclusions from the Social Sciences," (NY: Institute for American Values, 2005), summarizes some of the most important research.

[12] See David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem,* (New York: Harper, 1996) for the general overview of the issue. In one study, for instance, father involvement with children was the biggest single predictor of having fewer behavior problems, as important as higher parental education. See "Parental Involvement and Children's Behavior Problems," Paul R. Amato and Fernando Rivera, Journal of Marriage and the Family, Volume 61, No. 2 (May 1999), pp. 375-384.

[13] Judith S. Wallerstein, Julia M. Lewis and Sandra Blackslee, The Unexpected Legacy of Divorce: The 25 Year Landmark Study (New York: Hyperion, 2000). Pg xxxv.

[14] **Love and Economics: Why the Laissez-Faire Family Doesn't Work,** (Dallas TX: Spence Publishing, 2001); "Why Unilateral Divorce has no Place in a Free Society," **The Meaning of Marriage,** Robert P. George and Jean Betke Elshtain, eds.

with a known or anonymous donor. With the possible exception of adoption, these situations all entail structural injustices to children. Permitting same sex couples to have all the legal rights and privileges of marriage does not change this basic fact.

Children of third party reproduction may experience all the same problems as children of divorce and more. As adults, these children report feeling longings for their missing biological parent, anxiety about meeting and inadvertently falling in love with a half-sibling, and anger about being partially bought and paid-for.[15]

Like divorced and single parents, the adults utilizing third party reproduction may be good decent people who love their children. They may have fine parenting skills and be loving people, yet they cannot entirely compensate for the structural inequality that is built into their families. Parents may try vigilantly to rationalize the situation and reassure the children as to how loved they are, but this may not be enough to satisfy the children's longings to know their missing parent and their full genetic and cultural identities.[16]

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[15] See Elizabeth Marquardt, Norvell Glenn and Karen Clark, "My Daddy's Name is Donor: A Pathbreaking Study of Young Adults Conceived through Sperm Donation," (NY: Institute for American Values, 2010). See also the many blogs and websites started by Donor Conceived Persons, such as http://www.tangledwebs.org.uk/tw/, http://www.anonymousus.org/index.php, http://donorconceived.blogspot.com

[16] See the stories written by Donor Conceived Children at the Anonymous Us site: http://www.anonymousus.org/stories/index.php

Even worse for children is "traditional surrogacy." The "traditional surrogate" is impregnated using donor sperm and her own egg. When the baby is born, she gives the baby to the "intended parents" who have paid her for her trouble and genetic contribution- the purchase of a human being. Though adults have tried to rationalize the situation and reassure the children how loved they are, the children produced by such arrangements do not necessarily believe it, and sometimes the assurances are not even true. In 2013, the District of Columbia was considering loosening the restrictions on traditional surrogacy.[17] Jessica Kern was one person who spoke against it.[18] She was the product of a "traditional surrogacy" arrangement. She was lied to about her origins and abused by her adoptive mother (her father's wife).

This Court should not ignore the far-reaching ramifications its decision could potentially have on all aspects of family life. If this Court finds in favor of Petitioners, and ignores the long-standing public purpose of marriage, then third party reproduction, including surrogacy, will become even more prevalent. Advocates of "marriage equality" are already

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[17] "DC Debates Reversing Ban on Surrogacy Agreements," WAMU News, June 24, 2103. http://wamu.org/news/13/06/24/dc_debates_reversing_ban_on_surrogacy_agreements last accessed March 15, 2015.

[18] Her testimony is posted on the blog, "The Other Side of Surrogacy," June 19, 2013. http://theothersideofsurrogacy.blogspot.com/2013/06/judiciary-and-public-safety-bill-20-32.html last accessed March 15, 2015.

advocating "surrogacy equality."[19] If third-party reproduction increases, so will the structural injustices to children. Respondent States have a public duty to minimize structural injustice.

B. Respondents Have an Interest in Promoting the Best Possible Social Outcomes for Children

Those who advocate for genderless marriage often give assurances regarding social "outcomes," claiming that the children will be fine no matter what the adults in their lives decide to do. The question of "outcomes" for children is, in the view of amici, secondary to the question of structural injustice to children. Nonetheless, this Court should very closely scrutinize any claims made by Petitioners or their supporting amici that outcomes are no different when comparing children from same sex households to children with opposite sex parents. The American Psychological Association has asserted that "not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents." These claims, however, are dubious at best because they have been

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[19] See the video connected with this story, "Baby M and the Question of Surrogacy," **NY Times,** March 23, 2014, http://www.nytimes.com/video/us/100000002781402/baby-m-and-the-question-of-surrogacy.html At around the ten minute mark, a gay couple describes the babies they acquired through the use of donor eggs and a paid gestational surrogate. They say they spent about $120,000 for their babies. At the end of the video, one of them remarks, "What comes next after one gets married? Kids. So that is the logical the next step. There needs to be surrogacy equality in all states."

based upon studies with seriously flawed methodology.[20]

One particularly noteworthy example of flawed methodology is a study by Dr. Charlotte Patterson. "Recruitment began when I contacted friends, acquaintances and colleagues who might be likely to know eligible lesbian mothers," Dr. Patterson states, which certainly is not a recognized random sampling procedure. She recruited a grand total of 26 children, and did not form a control group of children raised by intact heterosexual married parents.[21] Despite this seriously faulty procedure, Dr. Patterson is the author of the American Psychological Association brief

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[20] This quotation is from the American Psychological Association (APA) 2005 Brief on "Lesbian and Gay Parenting." Charlotte Patterson, "Lesbian and Gay parents and their children: summary of research findings," American Psychological Association 2005, pp 5-22, quote on pg 15. http://www.apa.org/pi/lgbt/resources/parenting-full.pdf A recent comprehensive review of the 59 studies that made up the APA's report concluded that every study cited had serious methodological flaws. "Not one of the 59 studies referenced in the 2005 APA Brief compares a large, random, representative sample of lesbian or gay parents and their children, with a large, random, representative sample of married parents and their children." Loren Marks, "Same-sex parenting and children's outcomes: A closer examination of the American psychological association's brief on lesbian and gay parenting," Social Science Research, 41 (2012) 735-751, quote on page 748.

[21] Charlotte Patterson, "Families of the Lesbian baby boom: Parents' division of labor and children's adjustment," **Developmental Psychology**, 1995, Vol. 31, no. 1, 115-123, quote on page 116.

claiming "no differences" between children in different family forms.[22]

Another example was reported in the June 7, 2010 issue of the journal *Pediatrics*.[23] This study was based upon the self-reported results of an unrepresentative sample of lesbian mothers of 78 teenagers, which is an insufficient data set for drawing sweeping conclusions. The headlines around the world announced "lesbians make the best parents," even though the study did not support that assertion. A 2010 survey of 80 studies admitted that there was very little evidence about male couples as parents.[24] The conclusions frequently presented to courts in favor of same-sex parenting are not substantiated by sufficient data.

A 2012 Canadian study stands in sharp contrast to the small data samplings and sweeping generalizations proffered by the studies mentioned above. The study

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[22] American Psychological Association (APA) 2005 Brief on "Lesbian and Gay Parenting." Charlotte Patterson, "Lesbian and Gay parents and their children: summary of research findings," American Psychological Association 2005, pp 5-22, http://www.apa.org/pi/lgbt/resources/parenting-full.pdf

[23] "US national Longitudinal Lesbian Family Study: Psychological Adjustment of 17-year-old Adolescents," by Nanette Gartrell and Henny Bos, *Pediatrics*, 2010, Volume 126, Number 1, July 2010.

[24] "How does the gender of parents matter?" by Timothy Biblarz and Judith Stacey, *Journal of Marriage and Family* 72 (February 2010):3-22. "Comparable research on intentional gay fatherhood... has scarcely commenced...We located no studies of planned gay fathers that included child outcome measures and only one that compared gay male with lesbian or heterosexual adoptive parenting." Quote at page 10.

conducted by D.W. Allen was based on census data compiled by the Canadian government. The large random sample allowed for control of parental marital status, distinguished between gay and lesbian families, and was large enough to evaluate differences in gender for both parents and children. Most importantly, the principle variable studied was high school graduation. This is an objective, easily observed measure, in contrast to the subjective reports of child-functioning so often reported in studies claiming "no difference."[25]

The study measured high school graduation rates and compared the rates of children within married same-sex households and married opposite-sex households. The study found that children living in same-sex homes were less likely to graduate from high school. These results held true, even when statistically controlling for various control factors, such as the sex of the same sex parents, the sex of the child, and the education levels of the parents.

Another sophisticated study was performed by sociologist Mark Regnerus at the University of Texas at Austin. He used a professional polling company to take a random sample of young adults aged 18-39, who were asked a battery of questions about their current lives, their childhoods, and their families when they were growing up. The nearly 3,000 individuals came from a variety of family forms, including some whose mothers or fathers had "ever had a same sex relationship."

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[25] Douglas W. Allen, "High School Graduation Rates Among Children of Same-Sex Households," *Review of Economics of the Household,* published on-line September 26, 2013.

This study, like the Canadian study, is superior to previous research because it is a large, random, representative sample. It can potentially show the long term impact of childhood family structure. It asks the young adults themselves about their life experiences, rather than asking mothers about their small children as previous researchers had done.[26]

The Regnerus study found significant differences between the outcomes for children raised in intact biological families and children whose parents ever had same sex relationships. For instance, adult children whose mothers had lesbian relationships were more likely to report themselves being on public assistance, being unemployed, and having had an affair.[27] These

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[26] Mark Regnerus, "How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study," **Social Science Research**, 41 (2012) 752-770.

[27] Ibid, Table 2. This table also shows that these young adults are more likely to report having been sexually touched by a parent or adult caregiver, that they had been forced to have sex against their will, than those who had been brought up in intact biological families. Twenty-three percent of young adults whose mothers had a same sex relationship had been touched sexually by a parent or adult care-giver, compared with 2% of those whose parents were continuously married, 10% of those whose parents were divorced or never married, and 12% of those who lived in a stepfamily. Thirty-one percent of young adults whose mothers had had a same sex relationship and 25% of those whose father had had a same sex relationship reported that they had ever been forced to have sex against their will, compared with 8% of those whose parents were continuously married, 23% of those who had been adopted, 24% of those whose parents had divorced, 16% of those who lived with stepparents and 16% of those whose parents were never married. While 90% of those whose parents were continuously married

young adults also were more likely to report being depressed, that they felt less secure as children, and that their current relationship was in trouble.[28]

The Regnerus study has been widely criticized for not making appropriate distinctions between instability in families that had experienced at least one episode of same sex parenting. According to one calculation, only two of the families classified as headed by "lesbian mothers" were truly headed by a stable pair of women for the entire lifetime of the child,[29] which is certainly a legitimate concern. However, such concern is mitigated by the fact that the children classified as having had "lesbian mothers" or "gay fathers" show worse outcomes than children of divorce. The evidence suggests social or developmental processes taking place in these homes that distinguish them from other homes characterized by some form of family instability.

Moreover, the scarcity of stable lesbian couples in this truly random, large-scale sample is itself suggestive. Advocates suggest, but do not demonstrate, that stable long-term couples are the norm among

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reported themselves as "entirely heterosexual," only 61% of those whose mother had a same sex relationship and 71% of those whose father had a same sex relationship reported themselves as "entirely heterosexual." Just over 80% of young adults who grew up in all other family forms, including adopted, divorced, stepfamily and never married parents, reported themselves as "entirely heterosexual."

[28] Ibid, Table 3.

[29] http://www.regnerusfallout.org/frequently-asked-questions

same sex households. Dr. Regnerus made an effort to take a genuinely random, representative sample of the population, even over-sampling adult children whose parents had some involvement in a same sex relationship, but he could scarcely find such couples. The couples studied by Charlotte Patterson and others, therefore, may not be representative of the average experience of children whose parents are same sex attracted.

The results of both the Allen study of Canadian young people and the Regnerus study of American young adults are certainly not the final word on the subject. However, they are more than sufficient to disprove the claim that "not a single study has found children of lesbian or gay parents to be disadvantaged."

Individual stories from adults who were raised in same-sex households provide insight that studies and data do not. Many individuals raised by same sex couples have spoken out to say that their experiences do not match up with the storyline promoted by gay advocacy groups.[30] In France in 2013, about one million people marched in Paris in favor of man woman marriage. Just prior to that march, a 66 year old man who had been raised by two women told his story. He said, "I experienced the absence of my father as an

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[30] Robert Oscar Lopez, "Growing up with two moms: the untold child's view," The Public Discourse, August 6, 2012. http://www.thepublicdiscourse.com/2012/08/6065/ Janna Darnell "Breaking the Silence: Redefining Marriage hurts women like me, and our children," The Public Discourse, September 22, 2104, http://www.thepublicdiscourse.com/2014/09/13692/

amputation."[31] Other children of same sex couples have reported similar feelings of loss,[32] are now being vilified for speaking out,[33] and have even had their livelihoods threatened.[34] The "consensus" that "the kids are ok" has been manufactured by systematically excluding evidence that detracts from the narratives that favor genderless marriage.

This Court must ultimately answer this question: why is "marriage equality" for adults more socially

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[31] "Jean-Dominique Bunel : «J'ai été élevé par deux femmes»" First published in **Le Figaro** on January 10, 2013, reprinted in **Chretiente**, http://www.chretiente.info/201301105157/jean-dominique-bunel-jai-ete-eleve-par-deux-femmes/ Monsieur Bunel has a long and distinguished career of humanitarian service.

[32] *See* Amicus Brief of Oscar Lopez, *Brenner v. Armstrong*, case # 14-14061 (11th Cir. 2014) (Case Pending) available online at http://www.scribd.com/doc/251078014/Robert-Oscar-Lopez-Amicus-Brief#scribd

See also 'Quartet of Truth': Adult children of gay parents testify against same-sex 'marriage' at 5th Circuit, Lifesite News January 13, 2015 https://www.lifesitenews.com/news/quartet-of-truth-adult-children-of-gay-parents-testify-against-same-sex-mar

[33] "Christian Daughter Spits on Her Gay Parents" March 19, 2015 http://www.dailykos.com/story/2015/03/19/1372065/-Christian-Daughter-Spits-on-Her-Gay-Parents#

[34] Rivka Edleman, "This Lesbians' Daughter has had enough," The American Thinker, October 20, 2014, http://www.americanthinker.com/articles/2014/10/this_lesbians_daughter_has_had_enough.html Robert Oscar Lopez, "A Tale of Targeting," First Things, October 21, 2014, http://www.firstthings.com/web-exclusives/2014/10/a-tale-of-targeting

compelling than family structure equality for children? Without a coherent answer to this question, the Sixth Circuit's judgment must be affirmed. States have a rational, vested, and compelling interest in protecting children from structural injustices and negative social outcomes.

CONCLUSION

This Court spoke of the "changing realities of the American family" in *Troxel*, and the Massachusetts Supreme Court made a similar reference in *Goodridge*. Courts speak of such things as if they are merely reacting to social scenarios, without regard for the fact that these social scenarios are usually the unintended consequences of bad judicial decisions.

Despite court decisions to the contrary, the public purpose of marriage is, and has always been, to legally attach mothers and fathers to their children and one another. Ignoring the procreative feature of marriage creates legal chaos with regard to fundamental Constitutional rights, as well as social chaos, by creating a world in which families are determined by policy, rather than biology.

Parents have a Constitutional right to parent the children they conceived, and children have a corresponding Constitutional right to be cared for by their parents. Children have a right to a relationship with both natural parents, absent some unavoidable or compelling circumstance. Children have the right to their identity and to know who they are, including their genetic and cultural heritage.

Genderless marriage significantly impedes the exercise of these important Constitutional rights.

"Marriage Equality" ensures parents and children will have less equality, not more. Supporting the right of familial association helps prevent structural inequalities to children and helps to prevent negative social outcomes. States have the duty to implement laws that work toward these ends.

The thin disguise of "marriage equality" will not mislead anyone, nor will it atone for the wrong this day done.[35] The attempt to create "equality" will forge other, more serious inequalities and injustices throughout society. The campaign for genderless marriage has focused so tightly on this one issue of "equality" that numerous other significant issues have never fully come to light for a thorough airing. This Court can honorably return these important issues to the states and civil society for the comprehensive discussion they deserve.

Amici Dr. Jennifer Roback Morse, PhD and The Ruth Institute respectfully ask this Court to AFFIRM the decision of the Sixth Circuit Court of Appeals, find in favor of Respondent States, and uphold the Constitutional rights of children and parents by affirming the public purpose of marriage.

Three generations of social engineering are enough.[36]

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[35] Slight paraphrase of Justice Harlan's dissent in *Plessey v. Ferguson*, 163 U.S. 537, 562 (1896).

[36] Slight paraphrase of Oliver Wendell Holmes in *Buck v. Bell*, 274 U.S. 200 (1927).

Respectfully submitted,

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